IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no:3449/2023

In the matter between

CEPHAS MOTSOARI MOTSOANE	**APPLICANT**
and	
LEGAL AID SOUTH AFRICA	**1ST RESPONDENT**
CHAIRPERSON OF THE BOARD LEGAL AID SOUTH AFRICA	**2ND RESPONDENT**
ALL MEMBERS OF THE BOARD LEGAL AID SOUTH AFRICA	**3RD RESPONDENT**
MS/MRS. MANTITI KOLA CHIEF EXECUTIVE OFFICER LEGAL AID SOUTH AFRICA	**4TH RESPONDENT**
CHIEF OPERATIONS OFFICER LEGAL AID SOUTH AFRICA	**5TH RESPONDENT**
MS/MRS. PORTIA THANGAVHUELELO NATIONAL OPERATIONS OFFICER LEGAL AID SOUTH AFRICA	**6TH RESPONDENT**
PROVINCIAL MANAGER LEGAL AID SOUTH AFRICA GAUTENG PROVINCE	**7TH RESPONDENT**

MS/MRS. NCEKAZI MOAHLODI MANAGER
JOHANNESBURG JUSTICE CENTRE LEGAL AID
SOUTH AFRICA — 8TH RESPONDENT

ADVOCATE ENRICE GUARNERI HIGH COURT UNIT
MANAGER LEGAL AID SOUTH AFRICA JOHANNESBURG — 9TH RESPONDENT

ADVOCATE MBONGENI MBATHA LEGAL PRACTITIONER
LEGAL AID SOUTH AFRICA JOHANNES JUSTICE CENTRE — 10TH RESPONDENT

MS/MRS. ELSE SEBE LEGAL PRACTITIONER LEGAL AID
SOUTH AFRICA JOHANNESBURG JUSTICE CENTRE — 11TH RESPONDENT

MR. NTAKE LEGAL PRACTITIONER LEGAL AID
SOUTH AFRICA JOHANNESBURG JUSTICE CENTRE — 12TH RESPONDENT

PROVINCIAL MANAGER LEGAL AID SOUTH AFRICA
FREE STATE PROVINCE — 13TH RESPONDENT

MR. MACHINI MOTLOUNG LEGAL PRACTITIONER
LEGAL AID SOUTH AFRICA BLOEMFONTEIN JUSTICE
CENTRE FREE STATE PROVINCE — 14TH RESPONDENT

I. L. DE WET LEGAL PRACTITIONER LEGAL AID SOUTH
AFRICA BLOEMFONTEIN JUSTICE CENTRE FREE STATE
PROVINCE — 15TH RESPONDENT

LEONA SMIT LEGAL PRACTITIONER LEGAL AID SOUTH
AFRICA BLOEMFONTEIN JUSTICE CENTRE FREE STATE
PROVINCE — 16TH RESPONDENT

And

Not reportable

Case no:5153/2022

In the matter between

LEOCEPHAS MOTSOARI MOTSOANE **APPLICANT**

and

CHAIRPERSON OF THE BOARD LEGAL AID SOUTH AFRICA **1st RESPONDENT**

CHIEF EXECUTIVE OFFICER LEGAL AID SOUTH AFRICA **2nd RESPONDENT**

CHIEF OPERATIONS OFFICER LEGAL AID SOUTH AFRICA **3rd RESPONDENT**

PROVINCIAL MANAGER LEGAL AID SOUTH AFRICA (FREE STATE) **4th RESPONDENT**

IL De WET LEGAL AID SOUTH AFRICA **5th RESPONDENT**

LEONA SMIT LEGAL PRACTITIONER LEGAL AID SOUTH AFRICA BLOEMFONTEIN JUSTICE CENTRE FREE STATE PROVINCE **6th RESPONDENT**

Coram: **MOLITSOANE, J**

Heard: **30 MAY 2024**

Delivered: **26 AUGUST 2024**

ORDER

CASE NO: 3449/2023

The application is dismissed with costs on scale A.

CASE NO: 5153/2022

The application is dismissed with costs on scale A.

JUDGMENT

Molitsoane J

[1] The applicant instituted various applications against the respondents seeking different reliefs. On 18 January 2024 Van Zyl J, *inter alia*, made the following orders:

a) 'The contempt of court etc. part of the main application filed under case number 1857/2021 on 24 August 2022, is separated from the main application.

b) The separated part of the main application referred to in paragraph 1 above, application number 5153/2022 and application number 3449/2023 are consolidated and the three applications are subsequently to be adjudicated simultaneously.

c) . . .

d) The remaining part of the main application under application 1857/2021, is to remain a separate application, the merits of which will only be adjudicated once the three applications referred to above have been finalized and a legal representative has been appointed to assist the applicant therein or the applicant has declined such legal representation.

e) d) Mr. Geyer employed by the Bloemfontein Local Office of Legal Aid South Africa is requested to e-mail this judgment an order to the other relevant respondents in the employment of Legal Aid South Africa.'

[2] Van Zyl J also issued directives as to the filing of further affidavits in order to case manage these proceedings.

CASE NUMBER 3449/2023

[3] In this application, the applicant seeks as a starting point, condonation for the late filing of the replying affidavit. I granted the application in the absence of opposition and I proceed to deal with the merits of the case.

[4] The applicant seeks a myriad of orders against the Legal Aid South Africa (LSA) and its functionaries. From the notice of motion, it appears that the applicant seeks declaratory orders. As can be gleaned from the citation above, there are 16 respondents; some of them are in Gauteng while the others are within the jurisdiction of this Division. The essence of the case of the applicant is captured as follows by the applicant:

'4. This litigation is instituted by the Applicant against the Respondents in this matter given their unfair, unconstitutional, unlawful and wrongful conduct <u>to have deliberately failed in an arrogant and flagrant manner to provide the Applicant with proper, effective or competent legal representation during his criminal trial and hearing of his appeal respectively. The Respondents also acted in bad faith against the Applicant by having deliberately provided illusory, improper, ineffective or incompetent legal representation to him.'</u> (My emphasis.)

[5] It appears from the record filed that the applicant was convicted and sentenced to an effective term of imprisonment in the Regional Magistrate Court in Gauteng on two counts of robbery with aggravating circumstances and possession of ammunition. He appealed to the South Gauteng High Court and on 14 November 2013 under case number A216/2013, his appeal was dismissed. He is unhappy with the legal representation he received during his hearing and at the appeal stage.

[6] From the above, it appears that the issue of the jurisdiction of this court looms on the horizon. It is clear from the papers filed that the source of the complaint arose out of the legal representation afforded to the applicant in Gauteng and on a matter which arose in Gauteng. It seems to me that the only reason that this matter is before this court is for the convenience of the applicant. He is incarcerated at Mangaung Prison within the jurisdiction of this court.

[7] Much as it appears on the face of it that this court has no jurisdiction in this matter, I am willing to accept that this court is clothed with jurisdiction in view of the consolidation order granted by my sister Van Zyl J. The consolidation order also included the contempt of the court application issued under case number 3449/2023. The order on which the

contempt of court application is premised, was granted by the Judge of this Division. Again, during the hearing of this application.

[8] It is necessary to deal with the issue of the burden of proof in our law. It is often said that 'he who alleges must prove'. The court in *Pillay v Krishna and Another*[1] dealt with the basic rules which govern the incidence of the burden of proof. The court said the following: 'If one person claims something from another in Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it: ". . . Where the person against whom the claim is made is not content with a mere denial of the claim, but sets up a special defence, then he is regarded *quoad* that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it. . . . But there is a third rule, which Voet states . . . as follows: "He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute." . . . The onus is on the person who alleges something and not on his opponent who merely denies it.'[2]

[9] The assertion by the applicant that he was granted 'illusory, improper and ineffectual legal representation' is without merit. This assertion is not based on any factual basis. The applicant asserts that the 12th Respondent abandoned oral argument and replaced it with, what he terms, poorly written argument at the end of the defence case. While an accused is entitled to address the court at the end of the state's case, a verdict in any trial is supposed to come after careful analysis and evaluation of the evidence. While addresses are invaluable in the adjudication of the issues in dispute, they do not replace the evidence.

[10] What cannot be disputed is that this trial took place in the presence of the applicant as it is required by s 158 of the Criminal Procedure Act 51 of 1977. It is axiomatic that the presence of the applicant during the trial also entitled him to give instructions at all material times to his legal representative(s). The applicant makes no averments that he gave instructions to his legal representatives and same were not heeded. Even if this were so, he could simply have terminated the mandate of his erstwhile legal representatives and maybe referred the matter to the regulatory professional body to which such legal practitioner belonged, if such a practitioner acted without instructions.

[1] *Pillay v Krishna and Another* 1946 AD 946.
[2] Ibid at 951-952.

[11] During the hearing of this application, it was established that the applicant is not legally qualified and trained in law. His opinion as to the competency and knowledge of the law of the legal representatives who appeared for him is irrelevant for the purposes of determining whether such representation was effective or not, he is simply a lay person in law. His complaint must be based on facts. He dismally failed in this regard. As such, his claim is baseless and cannot succeed.

CASE NUMBER 5153/2022

[12] In this application, the applicant seeks an order to hold the respondents in contempt of the order of this court. On 8 March 2022 the applicant brought an urgent application under case number 1857/2021 against the South African Human Rights Commission (the SAHRC). During the hearing of this application, the court made the following order:

'i. The matter is struck from the roll.

ii. No order is made as to costs.

iii. The matter is referred to Legal aid South Africa (First Respondent) to supply the applicant with legal representation in order for him to prepare and promote his case.'

[13] It is settled that the applicant who alleges contempt of an order of court must establish the following jurisdictional facts in order to succeed with this kind of an application, namely that: (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it, and (c) the alleged contemnor failed to comply with the order of the court.[3]

[14] Upon proof of the above three elements, willfulness and *mala fides* will be presumed and the evidentiary burden will shift to the contemnor. Willfulness and *mala fides* have to be established beyond a reasonable doubt.[4] Failure by the respondent to discharge this burden, will result in contempt being established.

[15] The existence of the order is not in dispute. I, however, need to mention that the

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[3] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* [2021] ZACC 19; 2021 (9) BCLR 992 (CC) para 37.

[4] *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others: Mkhonto and Others v Compensation Solutions (Pty) Ltd* [2017] ZACC 35; 2017(11) BCLR 1408 (CC); 2018 1 CC para 62.

order to provide legal aid to the respondents was made without affording the LASA the opportunity to make any submissions. This order was not attacked by any of the respondents. The Respondents chose not to review the order of court forcing them to grant legal aid to the applicant. According to them they complied with the order.

[16] As indicated above, it must be proven that the contemnor was served with the order or had knowledge with it. The applicant did not file any returns of service against any of the applicants. Van Zyl J had ordered that one Mr. Geyer should email the judgment and the consolidation order to the respondents. The judgment and order of consolidation did not take away the obligation which rests on the applicant to have the order properly served on the respondents. The applicant made an impassioned plea to the court to 'understand' that he is in custody and a lay person and had no means to effect service on the respondents. Much as I sympathies with the applicant, the fact is that it will not serve the best interests of justice to make a finding of contempt without the person(s) having been served with the application and granted her/him the opportunity to be heard. In any case, Mr. Geyer did not file any service affidavit, even on the consolidation order. In *Mjeni v Minister of Health, Eastern Cape*[5] the court said the following:

'I would like to stress that contempt of court proceedings can only succeed against a particular official or person if the orders have been personally served on him or its existence brought to his attention and it is his responsibility to take steps necessary to comply with the order but he willfully and contemptuously refuses to comply with the court order.'[6]

[17] I am not satisfied in the absence of any proof to the contrary, that all the respondents had been properly served. I, however, accept that some of the respondents may have had knowledge of the application. There is no evidence that all the respondents are still employed by Legal Aid South Africa. Failure to satisfy the court that there had been personal service on the respondents in their personal capacities is fatal to the applicant's case especially when their committal is on the offing.[7]

[18] The respondents contend that they complied with the order of the court. In this regard they instructed the fifth respondent, who is a legal practitioner, to consult and compile a merit assessment report on the case of the applicant. In the assessment, the

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[5] *Mjeni v Minister of Health, Eastern Cape* 2000 (4) SA 446 (TkHC) 454G-H.
[6] Ibid at 454G-H.
[7] Footnote 4 para 103.

fifth respondent concluded that there were no merits in the relief sought by the applicant. The applicant was informed that the legal aid had to be terminated. According to the respondents, the applicant was informed to follow the internal processes of the Correctional Services Department and/or contact NICRO or South African Prisoners Organisation for Human Rights. The applicant was informed of the decision by the first respondent.

[19] The Legal Aid Manual to the Legal Aid South Africa Act 39 of 2014 provides:

'**Regulation 9**

(1) Legal Aid South Africa may grant legal aid to a litigant in any civil matter if –

(a) in the opinion of Legal Aid South Africa, the matter has good prospects of success.

(b) in the opinion of Legal Aid South Africa, the matter has good prospects of enforcement of a court order; and

(c) Legal Aid South Africa has the necessary resources available, based on a written merit report, where such report is applicable."

(2) Legal Aid South Africa may, subject to sub regulation (1), provide legal aid for the purpose of compiling a merit report, before any steps are taken, except where steps are necessary to prevent prescription, default judgment of lapsing of the litigants' rights.

Regulation 27

(1) In order to qualify for legal aid in either civil or criminal cases, the legal aid applicant's gross monthly income less tax and net assets must fall within the parameters set by the means test contemplated in subregulations (2), (3), (4), (5), and (6) before legal aid may be granted.

(2) An applicant who applies for legal aid for a civil case and who does not have a spouse or is not a member of a household and has a net monthly income, after deduction of income tax, of R8 200.00 a month, or less, may qualify for legal aid for that civil matter.

(3) An Applicant who applies for legal aid for a civil case and who has a spouse, or the applicant is a member of a household and whose household has a monthly income, after deduction of income tax, of R9 000.00 a month or less, may qualify for legal aid for that civil matter.

(4) A legal aid applicant or an applicant who is a member of a household who does not own immovable property and has net movable assets of less than R151, 700.00 in value may qualify for legal aid for a civil or criminal matter.

(5) A legal aid applicant of an applicant who is a member of a household who owns immovable property and has net immovable assets and movable assets in value of up to R711 700.00 may quality for legal aid for a civil or criminal matter: Provided that the legal aid applicant or the member of a household must physically reside in the immovable property or in at least one of the immovable properties, where there is more than one, unless Legal Aid South Africa decides to the contrary.

(6) The amounts contemplated in sub regulations (2), (3), (4), (5), and (6) will increase annually on 1 April on the basis of the Consumer Price Index, rounded off to the next 100.'

[20] It is common cause that when the court ordered LASA to provide legal aid to the applicant, LASA was not a party to the dispute between the applicant and the SAHRC. LASA was not granted the opportunity to weigh in on the issue of whether the applicant qualifies for legal aid in terms of its guidelines and statutory provisions. Fairness dictate that LASA should have been granted the opportunity to make its own assessment and according to its dictates, decide on the issue whether to grant legal assistance or not. If the applicant is aggrieved by the decision of LASA, then in that case, he still has remedies in terms of the internal processes of that organization. Apart from this, if he does not get any joy in the internal processes, he can still approach the court for review of the decision not to grant him legal aid.

[21] It has to be borne in mind that LASA receives its monies from the fiscus and other sources.[8] It is legally obliged to manage, use and account for the taxpayer monies it received in terms of the Public Finance Management Act 1 of 1999. It stands to reason that such monies cannot be expended on civil matters where LASA holds the view that they are unmeritorious. It is thus preferable that where the court is of the view that legal aid is necessary for a litigant to vindicate her/his rights, that the court should ideally refer such a litigant to LASA in order to apply for legal aid. This would obviate the need for LASA to seek to review the decision of the court where it deems meet to do so with great expense. Regulation 9 read regulation 27 promulgated in terms of the Legal Aid Act sets out the qualifications an applicant must meet in order to be eligible for assistance in a civil suit.

[22] The evidence reveals that LASA consulted with the applicant and compiled a merit

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[8] See s 21*(a)* and *(b)* of Legal Aid Act 39 of 2014.

report and found that there were no prospects of success in the relief sought. The applicant contended in the submissions before me that LASA was obligated to grant legal aid and had no business in considering the merits of the case of the applicant. This contention is flawed. It does not take into account that the fifth respondent is an officer of the court and has a duty to act ethically and with integrity towards the court. She cannot bring unmeritorious cases before the court well knowing that there are no prospects of success in the relief sought. If she were to do so, she would be exposing herself to possible personal costs orders. She would also be going against the pertinent criterion for eligibility as set out in the Regulations and the Legal Aid Manual and which her employer expects her to follow to the letter. She also has a duty, as a professional legal practitioner, to advise her clients accordingly, lest her clients would end up being mulcted with unnecessary costs which could have been avoided.

[23] In my view, upon receipt of the order from this court, LASA did all that had to be done in order to comply with the order granted. There is therefore no failure on its part to comply with the order of the court. The applicant has failed to prove two of the elements to trigger the presumption that the respondents' non-compliance was willful and *mala fide*. For this reason, no evidentiary burden shifts to the respondents. The application for contempt of court must accordingly fail. I can find no reason why I should depart from the principle that costs should follow the course.

Order

[24] In the result, I make the following order:

CASE NO: 3449/2023

The application is dismissed with costs on scale A.

CASE NO:5153/2022

The application is dismissed with costs on scale A.

[redacted]

P.E. MOLITSOANE, J

For the Applicant:	**In person**
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For the Respondent:	**Adv. Lamprecht**
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